DOCUMENT RESUME

ED 119 243 CS 202 580

AUTHOR Robertus, Patricia
TITLE Obscenity in the Mails: Controls on Second-Class Privileges 1942-1957.
PUB DATE 75
NOTE 45p.; Paper presented at the Annual Meeting of the Law Division, Association for Education in Journalism (Ottawa, Ontario, August 1975); Occasional light print

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage
DESCRIPTORS *Censorship; *Federal Government; Freedom of Speech; *Journalism; *Laws; *Periodicals
IDENTIFIERS Classification Act 1879; Espionage Act 1917; Esquire Magazine; *Post Office Department; Second Class Mail

ABSTRACT

In the years 1942-1957, the Post Office Department used controls on the low mailing rate as a form of administrative censorship, designed to limit the distribution of periodicals which it could not otherwise restrict. The Classification Act of 1879 imposed four conditions for admission to the second-class rate three of which were physical requirements, and one of which considered content. Several cases of second-class permit revocation, including that of the socialist "Leader" in 1917, demonstrate how these conditions were a form of censorship. Revocations were informal, and obscenity was determined mostly by visual inspection until 1940. Much of the change in postal policy came about when Frank Walker became Postmaster in 1940. One of the magazines censored by the Post Office Department at this time was "Esquire." The "Esquire" case and several other revocation cases suggest that control over second-class privileges was a powerful and much abused weapon in the hands of the Post Office Department, employed to apply economic sanctions against publications. (TS)

****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED119243

Obscenity in the Mails: Controls on Second-Class Privileges 1942-1957

PERMISSION TO REPRODUCE THIS COPYRIGHTED MATERIAL HAS BEEN GRANTED BY

Patricia Robertus

TO ERIC AND ORGANIZATIONS OPERATING UNDER AGREEMENTS WITH THE NATIONAL INSTITUTE OF EDUCATION. FURTHER REPRODUCTION OUTSIDE THE ERIC SYSTEM REQUIRES PERMISSION OF THE COPYRIGHT OWNER.

Patricia Robertus
Assistant Professor
Department of Journalism
Bradley University
Peoria, Illinois 61625

Presented to the Law Division, Association for Education in Journalism, Ottawa, Ontario, August 1975.

This paper is based on the author's unpublished doctoral dissertation (University of Washington, 1974.) Travel grants from the School of Communications made possible research at Princeton University and the National Archives, Washington, D.C.

CS 202 580

In December 1943 the Post Office Department revoked the second-class mailing permit of Esquire magazine. Esquire contested the revocation order and, twenty-six months later, the Supreme Court held that the postmaster general had exceeded his authority in denying the magazine the reduced mailing rate accorded periodicals. The Esquire case is well known to students of communications history and law; not so well known is that the Esquire revocation was one of some seventy actions against the second-class mailing privileges of allegedly obscene periodicals in 1942 and 1943.

This paper shows how in these years the Post Office Department used controls on the low mailing rate as a form of administrative censorship, designed to limit the distribution of periodicals which it could not otherwise restrict.

Periodicals have long enjoyed special mailing rates in the United States. In 1792 educational and informational matter, including newspapers, was granted a rate about one-sixth that of letter postage.[1] Eighty years later, mail was formally divided into classes and second-class mail was defined as "matter exclusively in print, and regularly issued at stated periods from a known office of publication."[2] This definition was amended in 1874 to say that second-class mail matter must also have a regular list of subscribers.[3]

These requirements were at first the only criteria for admission to the lowest mailing rate. A bill was introduced in 1878 which would have limited second-class rates to "only such publications as will disseminate intelligence and be for the highest good of the whole people. . . ."[4] This measure did not pass, but some of its language was revived in the Classification Act of 1879.

That act imposed four conditions for admission to the second-class rate. The first three described physical requirements:

> First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.
> Second. It must be issued from a known office of publication.
> Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

The fourth condition considered the content of the publication:

> Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; Provided, however, that nothing herein contained shall be construed as to admit to the second-class regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.[5]

The formal requirements of the act were tested in a series of Supreme Court cases early in the twentieth century. In one of these cases the Court defined a periodical for purposes of the second-class rate:

> A publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is complete in itself, and indicates a relation with prior or subsequent numbers of the same series.[6]

At the same time the Court adopted the position that issuance of mailing permits, although a question of law, was one in which the postmaster general retained discretionary power. The exercise of this power ought not to be interfered with unless it is clearly wrong. The Court warned that it would not undertake review of whether a certain publication would be considered a periodical; the decision of the Post Office Department in such matters would be conclusive.

A further test of the power to classify mail came in 1913, in Lewis Publishing Co. v. Morgan.[7] Here the Supreme Court upheld the Newspaper Publicity Law. This law, a section of the Post Office Appropriations Act of 1912, required periodicals to file semi-annual statements of ownership with the Post Office Department, and also required that publications admitted to the second class label as "Advertisement" all editorial or other reading matter for which compensation was paid.[8]

These requirements were found consistent with the power to classify mail. Just as publications devoted principally to advertising were excluded from the second-class rate, those admitted could be required to mark advertising content. While violations of the Newspaper Publicity Law could result in the loss of second-class mailing privileges, the publication was not thereby excluded from the mails. A periodical

which chose not to file a statement of ownership or refused to mark advertising content could be sent by any other appropriate class of mail. In Lewis Publishing the Court held that because the law did not exclude matter from the mails, it did not violate the First Amendment or the due process requirements of the Fifth. It was said to be a simple extension of the power to classify mail.

The Court, in Lewis Publishing, also noted that the second-class rate reflected the traditional assumption that Congress could discriminate in favor of newspapers in the mail. A few years later, the Post Office Department began to discriminate against newspapers in the mail, notably socialist and anarchist papers.

The Espionage Act of 1917[9] made no specific reference to second-class mail, yet the law became the basis for a number of permit revocations. This provided the first systematic, punitive action against publications enjoying the low mail rates.

The Espionage Act had many provisions, but only two broad concerns are relevant here. The act made it a felony to cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military forces, or to obstruct recruiting or enlistment into the services of the United States. And Title XII made nonmailable any matter in violation of the act.[10] A finding of nonmailability is one of the basic weapons used by the Post Office to control the contents of the mails. It is, as the name suggests, a notice that material may not be carried in the mails. Matter which violates certain federal laws regarding frauds, lotteries, obscenity and sedition is said to be nonmailable.[11]

The leap from the nonmailability provisions of the Espionage Act to second-class revocations was not great but it did require the application of tortuously faulty reasoning. The Post Office Department said that publications which were nonmailable did not qualify for the second-class rate. It drew support from the fact that the Mail Classification Act of 1879 referred to "mailable matter of the second class." The problem has to do with the definition of mailable. In the 1879 law, mailable is plainly in contradistinction to nonmailable in a physical sense. Thus, for example, an elephant is nonmailable, as is an unwrapped amoeba. The Classification Act merely categorizes those

things, which by their form, are capable of being transported in the mails. It says nothing about the content of things which can be mailed, except to distinguish between periodicals and non-periodicals, advertising and non-advertising matter, and the like.

However, the Post Office argued that publications which violated the Espionage Act were nonmailable and thus, not admissible tc the second class. Justice Louis Brandeis, in a famous dissenting opinion, dismissed this interpretation:

> The fact that material appearing in a newspaper is unmailable under wholly different provisions of law can have no effect on whether or not the publication is a newspaper. Although it violates the law, it remains a newspaper. If it is a bad newspaper the act which makes it illegal and not the Classification Act provides the punishment.[12]

Justice Brandeis' dissent came in the best known case involving a second-class permit revocation under the Espionage Act, the Milwaukee Leader case.

The second-class permit of the Leader, a socialist paper, was revoked in September 1917. The Post Office charged that the paper had "almost daily" printed articles which intended to interfere with the war effort, violated the Espionage Act and made the Leader non-mailable. The cited material included stories charging that the war was dishonorable and unjustified on our part; that the draft was unconstitutional, oppressive and arbitrary; that the government was plutocratic, the President autocratic and the Congress a rubber stamp.

The Post Office held that such material was nonmailable under the Espionage Act and revoked the mailing permit. Publishers of the Leader brought suit against Postmaster General A.S. Burleson and the case reached the Supreme Court in 1921.

In upholding the revocation, the Court found that the hearing accorded the paper satisfied the requirements of due process. It held that the power of the postmaster general under the Espionage Act was neither dangerous nor arbitrary. Since revocation did not exclude the paper from the mails nor preclude its reentry to the lower rate, the Court found that the order did not touch on First Amendment rights.

Central to the majority argument was the notion that the second-class rate was "a frank extension of special favors" to the publication. It was said to be a privilege to be maintained only so long as the

character of the publication remained substantially the same. In fact, the Leader had remained substantially the same; the interpretation of law had changed.

Justices Brandeis and Oliver Wendell Holmes issued strong dissents in the Leader case. Brandeis suggested that the second-class rate might be abolished, that the government could refuse either to accept periodicals for mailing or to carry them at low rates. But so long as the rate was maintained, it should not be denied to one publication because in the past it carried views which the postmaster general believed to be illegal. Justice Holmes went even further in his dissent:

> The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man.[13]

Brandeis and Holmes did not prevail and the Leader revocation was upheld. But the authority claimed by the postmaster general was rarely exercised in the next twenty years. Annually from 1920 to 1940 between two and three thousand permits were discontinued--alowed by the publisher to lapse--and between twenty and one hundred permit applications were denied. Most denials were for failure to meet the technical requirements about the proportion of advertising space and amount of unpaid circulation.[14]

In 1940 the Attorney General's Committee on Administrative Procedure summed up the recent history of second-class revocations:

> At the outset, it should be noted that despite their potential breadth, the powers in recent years have been sparingly used. As already observed, denial or revocation for 'radicalism' has not recently been an active issue. Further, the Department's power rather than the exercise thereof in particular cases to revoke or deny for obscenity has for the past several years been the subject of controversy. The absence of public clamor would seem to indicate that only cheap and tawdry obscenity has been barred, and that there has been no confusion between filth on the one hand, and what some might insist is art or education on the other.[15]

In the years before 1942 revocation proceedings typically took the form of "voluntary abandonment." This meant that a publication would not be notified that its permit was threatened until it tried to mail. The mailer would then be told that the matter would not be

accepted at second-class rates. If the publisher thought the revocation was improper, he might file a statement of fact and the revocation could be reconsidered. If not, he was said to have voluntarily abandoned the permit. This procedure was reported to work very well for the Post Office; however, it did not meet the statutory requirement of a hearing before revocation.[16] The attorney general characterized the proceedings as follows:

> Despite the requirements of the statute, hearings in the usual sense are not held in connection with revocation orders. If there is any personal appearance at all--a rather unusual occurrence, since the publisher may not be able to afford Washington representatives or a special journey to Washington or may not believe the trip necessary--the 'hearing' is nothing more than a conference about matters in issue between the publisher or his representative, and the Third Assistant Postmaster General or the Superintendent of the Classification Division. There is no presiding officer, no established order for presentation of evidence, and no stenographic record of the proceedings made. Although it is stated by Department officials that, if the publisher actually desired a hearing, the Department would grant it, it is to be noted that the citation letter gives no indication of this right, but simply gives the publisher until a certain date 'to submit any statement he desires' as to why his second-class mailing privilege should not be revoked.[17]

The standards used by the Post Office in determining what was "cheap and tawdry obscenity" were admittedly vague, but the attorney general did not find them inappropriately so:

> Although characterization of the text as obscene or treasonable may involve more delicate questions of personal judgment and discrimination than determination of whether the publication is 'formed of printed paper sheet, without board, cloth, leather or other substantial binding,' both determinations can be made by scrutiny of the matter at hand.[18]

And so the second-class permit was a peripheral concern in postal control of obscene literature in 1940. Revocations were informal and obscenity was determined pretty much by visual inspection. In September 1940 Frank C. Walker replaced James A. Farley as postmaster general. Eighteen months later the Post Office Department launched a massive effort to use denial and revocation of the second-class permit against allegedly obscene publications.

Much of the change in postal policy has been traced to Walker. His critics called him the Catholic representative on the cabinet and suggested that his department operated under the influence of the

National Organization for Decent Literature (NODL).[19] A prominent Catholic magazine took the same view and noted with approval, "It is well known that the Postmaster General has such a list of [forbidden] books to whose publishers he denies second class privileges."[20]

Since Farley was also a Catholic, the explanation of church influence should be carefully weighed. However, the NODL was especially diligent during Walker's tenure and he was a prominent Catholic layman, active in the Knights of Columbus and other church organizations. Walker's apparent responsive to the NODL left him open to criticism. While the fact that Walker was a Catholic does not adequately explain postal control during the years he served, it cannot be ignored.

For whatever reason, Walker clearly led the charge on the obscene. The first phase of his campaign was the censoring of periodicals prior to publication.

One of the magazines censored by the Post Office Department was Esquire. Esquire was founded in 1933 and was issued a second-class permit the same year. In 1937 the July issue was found to be non-mailable because it contained obscene materials and the magazine was warned that "failure to issue a mailable issue jeopardized the second-class status of the publication."[21] The November 1937 issue was also nonmailable and the magazine was again warned that if it continued "to indulge in the practice of publishing nonmailable issues, it will be necessary to take action leading to the revocation of its second-class mailing privileges."[22]

The November 1940 issue was also found to be nonmailable, again because of allegedly obscene content, and the danger to the second-class permit was re-emphasized.[23] However, it is important to note that none of the cited issues was actually excluded from the mails. All nonmailability orders to Esquire were after the fact. That is, after the magazine had been mailed the Post Office would object to its contents and find it nonmailable.[24]

Since these nonmailability orders did not result in exclusion from the mails, it is difficult to understand why Esquire would begin to submit dummies of issues for advance screening by postal officials. Yet, in November 1940 the magazine apparently volunteered to let the Post Office Department censor future issues. Starting with the

December 1940 issue, the editor of Esquire regularly changed copy in forthcoming issues of the magazine. And the practice seems to have been initiated by the magazine, not the Post Office Department. Arnold Gingrich, then editor of Esquire, later described the practice. While he mistakenly remembered it beginning in 1942, his description is telling:

> In the spring of 1942 we began to have trouble with the Post Office Department over the moral tone of Esquire. Our first communications with the department were all with its solicitor, Vincent Miles, and before long I was making monthly trips to Washington, taking the dummy of the next issue of Esquire to go to press, and going over it page by page, and particularly cartoon by cartoon, to get his clearance prior to publication. I hated doing it, and in fairness I must say he didn't seem to enjoy it any more than I did, but it seemed the only safe way to stay out of trouble. I would make all required revisions on the spot, and some of the things I had to 'tone down' seemed to me to be a case of bending over backward to avoid even the most sensitive of sensibilities to a degree that was nearly ludicrous.[25]

Again, it should be noted that no issue of Esquire had been excluded from the mails, but, according to Gingrich, "It was after being told, twice, that certain issues, though mailed, had later been deemed unmailable matter, that I began calling on the then Solicitor General Vincent Miles to attempt to foretell any more of these after the fact rulings."[26] The threat of such after-the-fact rulings could not have been so great as the threat of censorship, yet the magazine chose the latter.

It is known that copy was changed in the issues of August, September, October and November 1941 and January, March, April, May and July 1942--all to meet the objections of the Post Office.[27] The nature of these changes is not recorded. However, what is probably the first instance of prior censorship of Esquire is preserved.

The December 1940 issue was found nonmailable because of the inclusion of a verse, "The Knight Before Christmas." According to the postmaster general, upon being informed of the finding, "The editors of Esquire rushed to Washington and prevailed upon the solicitor to permit the issue upon condition that the text be reprinted."[28] The text was changed and the issue mailed.

The offending verse and the changes made are instructive. They illustrate the kind of material the Post Office sought to keep from

the mails and the values the Department tried to impose on Americans. The original version of "The Knight Before Christmas" read:

'Twas the month before Christmas
And all through the flat
There wasn't a sign
Of a cane or silk hat,
Poor Doris was lounging
In her silken bed
With visions of mayhem
In her pretty head
When on her pent-house roof
There arose such a clatter
She sprang to her feet
To find what was the matter,
When in stepped a gent
Who was dressed all in fur
And he started at once
Making passes at her . . .
He drank of her Scotch
And he drank of her charms
And he held her enslaved
In his two manly arms,
Resistance from Doris
Was not very strong
And somehow the moments
Just drifted along . . .
Then just as the dawn
Started lighting the sky . . .
He sprang to his feet
And he kissed her good-by . . .
And she heard him exclaim
As he started to leave:
'Just rehearsing, my dear,
I'LL BE BACK CHRISTMAS EVE!'[29]

Representatives of the magazine agreed to change the copy and the solicitor advised Esquire that if the changes were made, the issue would be mailable. The acceptable verse read:

'Twas the month before Christmas
And all through the flat
There wasn't a sign
Of a cane or silk hat,
Poor Doris was lounging
In her silken bed
With visions of mayhem
In her pretty head
When on her pent-house roof
There arose such a clatter
She sprang to her feet
To find what was the matter,

When in stepped a gent
   Who was dressed all in furs
Whose false-face revealed
   A stray husband of hers . . .
She gave him a drink
   And a casual hug
While wondering whether
   To pardon the lug,
With Christmas soon coming
   Temptation was strong
To let by-gones be by-gones
   Although it was wrong. . .
But long before dawn
   Started lighting the sky
He sprang to his feet
   And he kissed her good-by
But she heard him exclaim
   As he started to leave:
'Just rehearsing, my dear,
I'LL BE BACK CHRISTMAS EVE!'[30]

While neither version of the verse had much to recommend it, the first at least made sense. While the first version featured at worst light-hearted innuendo, the second was deadly moralistic. If the published verse saved Doris's virtue, it cost Esquire some integrity.

Other magazines also began submitting pre-publication dummies to the Post Office. PEEK, which later lost its second-class mailing permit, "always submitted the proof of its next issue to the POD for their [sic] approval and. . . followed its suggestions in regard to deleting certain material."[31] The number of magazines participating in this advisory censorship program is not known but the practice attracted some critical attention. Zechariah Chafee, writing in 1947, referred to the "practice of granting an imprimatur" by what he called "the censorship board," but he did not elaborate the point.[32] Curiously, the American Civil Liberties Union (ACLU) seemed to have approved of the practice, noting "[The Post Office Department] has even accommodated publishers by reviewing copy in advance of publication to indicate what would be objectionable" and the ACLU thought that this was evidence that the department was "reasonably tolerant in its administration of the laws against obscenity."[33]

The practice was abruptly discontinued in May 1942. In what appears to have been a form letter, the solicitor advised Esquire:

> For your information as a publisher using the United States mails, your attention is invited to the fact that the law does not require the POD to make a ruling as to the mailability of matter that is not in the mails or that has not been deposited for mailing. Since the POD cannot by a ruling relieve a mailer of responsibility for a violation of the postal statutes affecting obscenity, the Department declines to deal with the question of mailability of any matter which the senders feels may be in violation of such statutes, in advance of its actual deposit in the mails addressed for delivery to addressees.
>
> If one harbors doubt as to the mailability of the material offered, because of the statutes relating to obscenity, a sense of decency and good morals should compel him to conclude that the material should not be sent through the mails.
>
> The dispatch by postmasters and postal employees of matter deposited in the mails constitutes no guarantee of its mailability under the postal obscenity statutes. The postal obscene /sic/ statutes in question are criminal laws, and one must, of course, accept full responsibility for depositing any matter in the mails which is in violation thereof.[34]

The solicitor's letter suggested that the Post Office, by examining copy in advance of publication, had been protecting publishers from criminal prosecutions. This, however, does not seem to have been the case at all. While mailing obscene materials could lead to federal prosection under the 1873 Comstock Act,[35] relatively few instances were prosecuted. Most were instead the subject of administrative controls, principally the nonmailability ruling, and in 1942 and 1943, restrictions on second-class mailing privileges. The reference by the solicitor to criminal laws was no doubt a scare tactic.

The solicitor's letter announced the end of pre-publication censorship by the Post Office Department. And the end of this form of censorship marked the beginning of a new campaign on pulp magazines, one aimed at the low mailing rates they enjoyed. These magazines were for the most part aimed at a male audience and featured adventure, war, detective and man-against-the-elements stories, both true and fictional. The stories tended to be touched more with heroism than with sex. Illustrations often included women having their clothes torn off and had little to do with the stories illustrated. The Post Office had tolerated these magazines, issuing some nonmailability rulings but not really threatening them until the period of advisory censorship began. When it ended, they found their second-class mailing privileges in danger.

On April 21, 1942 the Post Office Department issued "Rules of Practice Governing Proceedings to Suspend, Annul, or Revoke Second Class Mailing Privileges."[36] The issuance of these rules announced the intention of the postmaster general to crack down on holders of the second-class permit and to use the privilege of low mailing rates as a weapon in administrative control of obscene literature.

The rules announced by the Post Office governed all proceedings relating to revocation of second-class permits. It has already been noted that in 1940 the Department ignored the statutory requirement for hearings before revocation. Under the 1942 rules, hearings were offered all publishers against whom revocation proceedings were initiated. These formal actions replaced the old practice of "voluntary abandonment."

Revocation proceedings began with a show cause order, that is, an order that the publisher appear at a hearing and show cause why the second-class permit should not be revoked. Failure to appear at the hearing resulted in an automatic loss of second-class privileges.

All hearings were held in Washington, D.C., obviously an inconvient location for many publishers. The postmaster general appointed one or more hearing officers to conduct the proceedings. All hearing officers were senior postal employees, including assistant postmasters, department heads and bureau directors. All were normally assigned to other duties and none was specially trained for judging obscenity.

Hearings began with the introduction of evidence by the solicitor, chief legal office for the Department. He might introduce physical evidence and call witnesses. Following the presentation by the Post Office, the respondent--the publisher--introduced his evidence and called witnesses. All witnesses were subject to cross-examination.

At the conclusion of the taking of evidence, oral arguments were heard. These were limited to one hour and the solicitor would open and close.

On the basis of the hearing, arguments and briefs filed by both parties, the hearing officers prepared a report to the postmaster general. The report included findings, conclusions and recommendations. If more than one hearing officer conducted the proceeding, each might file a report. These were not usually given to the respondent or made public.

The recommendations of the hearing officers were not binding on the postmaster general, who made the final decision to revoke the permit or to dismiss the proceedings, in which case the permit was retained by the publication. The postmaster general might accompany his order with a statement of opinion or reasons, but no explanation was required. Most orders issued in 1942 were rather lengthy--about twelve pages--explanations of the history and rationale of the second-class permit. Typically, there were few references to the publication losing the permit, except a brief listing of its sins. These orders were usually announced in groups of two or three and were released to the press. Early in 1943 the Post Office apparently adopted a new policy and stopped making the orders public.[37]

Because the revocation order set forth the Department's policy regarding second-class privileges, it is worthwhile to examine one order in detail. The one quoted from here happens to involve College Humor magazine[38] but it might be almost any other order since all were virtually identical.

The order began with the assertion that the second-class mailing privilege had consequences beyond the postage rate paid. Dealers and distributors of periodical literature were said to take the permit to mean that the publication was "definitely approved by the Government itself," and "fitting and proper for unrestricted circulation by and in the United States mails." The mailing permit, the order continued, was thought to be "a badge of merit, a certificate of good moral character of the publication."[39]

The order went on to discuss the classification of mail and the origins of the second-class rate. It traced the power to classify mail from the postal clause of the Constitution to the Classification Act of 1879 to the decision in the Milwaukee Leader case. The legislative and judicial history of the second-class rate was said to show that the privilege was in fact a privilege--an exension of special favors to newspapers and the periodical press. In order to qualify for the low rate, publications must meet conditions established by Congress. Among these are that the magazine be "mailable" matter and that it be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry."

The order specified what was meant by mailable matter. Since matter which was obscene, lewd or lascivious was nonmailable under sections of the criminal and postal codes, it could not be admitted to the second-class rate. Thus a finding that a periodical was obscene was sufficient cause to revoke its permit. In determining what constituted obscenity, the Department used the following standard:

> This postal law forbidding obscenity in the mails is designed, among other things, to prevent the use of the United States mails for sustained and systematic appeals to lascivious curiosity or for the circulation of periodicals published for the purpose of profitably pandering to the obscene, lewd and indecent. The purpose of this statute is to prevent the circulation and dissemination through the United States mails of matter corrupting and depraving the public mind by implanting obscene thoughts and desires. The statute forbids the presentation by mail to men, women and children of a form of indecency calculated to promote and foster the corruption of morals.
>
> Obscenity in the mails is forbidden, irrespective of whether matter is portrayed under the guise of art, fiction, humor, or sex education, or whether it appears in stories purporting to be detailed accounts of actual sex crimes.

In making his determination of obscenity and mailability, the postmaster general said that he would not be swayed by the "self-serving interpretations of the publisher as to the meaning or influence upon others of the matter published." But the publisher was not without guidance as to what violated the postal obscenity statute:

> No publisher who wishes to use the convenience and preferences of the United States mails need have difficulty in conforming to the injunctions of the postal obscenity statutes. If he has doubts whether the matter may violate the law, then his sense of decency and good morals will invariably lead him to resolve such doubts in favor of the public welfare and the public good. Such a self-imposed and self-chosen restraint would in no way be restrictive to the boldness of the press in thought and speech, and it would be self-assurance to a publisher that he was properly exercising his constitutional freedom 'to write and publish his opinions upon any subject, whatsoever, without prior restraint.'[40]

While the interpretation of the First Amendment might be a little fuzzy, the point was clear: Had the publisher but heeded his sense of decency, it would not be necessary to revoke the second-class mailing permit.

The revocation order then catalogued the publication's offenses against good morals by listing titles of recent items. In the case of College Humor, these included "Blond Bomber Banks on Curves," "Don't Look Now, But If You Want to See A Real He-Man Body" and "Outdoor Girls

Initiated Indoors." These titles were evidence for each of three grounds for revocation: 1) that the publication was nonmailable within the meaning of the postal obscenity statute; 2) that because of the inclusion of such material, the publication was not "originated and published for the dissemination of information of a public character. . ."; and 3) that it was not "a mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner /published/ nonmailable matter. . . ." In the case of College Humor, it was noted that three consecutive issues of the magazine had been nonmailable. However, apparently no issues had been excluded from the mails, the rulings being after the fact and made to supply evidence for the revocation.

The distinction between the first and third grounds is difficult to grasp. There is here the suggestion that a nonmailable newspaper or magazine somehow ceases to be a newspaper or magazine. As was noted earlier, this sort of reasoning was apparently used to justify second-class revocations under the Espionage Act in World War I, and soundly rejected by Justice Brandeis.

The revocation order concluded with the postmaster general's statement that after his examination of the exhibits, briefs, transcripts and reports, he found that the publication systematically violated the postal obscenity statutes and the conditions for admission to the second-class rate. The permit was revoked, "with leave to the publisher and the publication to file an application for second-class mailing privileges whenever the publication meets the requirements of the Classification Act of March 3, 1879."

Under the rules and policy announced in April 1942 the Post Office began to issue revocation orders--of the type just described--almost at once. In the next eighteen months some seventy publications were involved. The most frequent actions by the Department were revocations of existing permits. Subsequently, reentry was denied many magazines and others seeking a change in status found themselves without permits.

Revocation of the second-class permit did not bar all future issues of the publication from the mails. Mailable--non-obscene--numbers might still be carried at third- or fourth-class rates. These

rates were substantially higher than those of the second class and the difference could be fatal to marginal periodicals.* (See below)

For Esquire, with a circulation of about 700,000 copies, the difference amounted to $500,000 annually. An issue of Esquire weighed more and had a greater circulation than most publications which lost second-class permits, so it realized greater savings than many other second-class periodicals. But Esquire was also much more prosperous and better able to pay higher postage rates than most magazines.

Esquire ultimately provided the best test of the postmaster general's power over second-class mailing privileges. But that case did not begin until late 1943; by that time a large number of periodicals had run up against the Post Office Department's "policy relative to obscenity in the mails."

Many publications presented with a show cause order consented to revocation, either explicitly or by failure to respond. In June 1942 the publishers of Amazing Detective Cases consented to the suspension of its permit, reserving the "right to apply to the proper office of the Post Office Department at a later date for readmission and for second-class mail privileges upon indisputable proof of a changed policy which will clearly show that the material is nonobjectionable and

---

*Postage rates depend on mail classification, weight, zone and method of weighing. In 1942 the following rates applied:

First class:	3¢/oz.
Second class:	1½¢/lb. for editorial (nonadvertising) portion
	1½-7¢/lb. for advertising portion
Third class:	1½¢/2 oz. (maximum weight: 8 oz.)
Bulk:	12¢/lb. (maximum weight per piece: 8 oz.)
Fourth class:	7-15¢/1st lb.; ½-11¢/each additional lb.

Publishers measured the advertising in every issue of a periodical presented for mailing at the second-class rate, and submitted a statement to the local post office. Rates for the advertising portion of second-class mail and for all fourth class mail were based on zones. The country was divided into eight zones for this purpose. Major publishers established mailing offices in several locations to reduce mailing distances and thus qualify for lower zone rates.

Second-clas mail was weighed in bulk, which could produce significant savings over per-piece rates.
(U.S., Post Office Department, Postal Laws and Regulations of 1940 /Washington, D.C.: Government Printing Office, 1940/)

mailable in accordance with the laws and statutes made and provided in such cases for the granting of second-class mailing privilges."[41]

One of the first to lose the second-class permit was Real Screen Fun, which apparently did not respond to the show cause order. Its permit was revoked May 20, 1942.[42] Argosy also failed to appear at a scheduled revocation hearing and forfeited its mailing permit. The magazine was cited for stories which included "Sex Outrages by Jap Soldiers," "The G-String Murders" and "How Paris Apaches Terrorize Nazis in Girl Orgies."[43] The publishers of Argosy declined to attend the hearing, informing the postmaster general that they had "no intention of contesting the charges based on the last three issues."[44] Romantic Story, Real Detective and Laff also failed to appear at revocation hearings, and lost their mailing permits.[45]

Sleek was cited for stories such as "You Need a Hobby, "Stop Those Hiccups" and "Female Beauty Around the World. . .World's Greatest Collection of Strange and Secret Photographs. . .1000 Revealing Photos." The last apparently was an advertisement, as it was mentioned in several revocation orders.

Sleek announced that it would not oppose revocation because it would discontinue publication with the September 1942 issue.[46] It is not known how many magazines may have ceased publication in the face of revocation orders. Many of these were low-budget periodicals which often have a high failure rate. While it may not be possible to trace failure to any single factor, the additional cost of postage, as already indicated, could be fatal to some.

Promises to atone were not entertained by the Post Office Department at revocation hearings. For example, Front Page Detective was issued a show cause order on June 4, 1942. The order cited previously published stories which made the magazine nonmailable and thus no longer eligible for the second-class permit. These included such literary events as "The Detective Knew That His Best Clue Indicated That the Slain Girl Had Been the Mistress of Some Man," "Mystery of the Beheaded Bride" and "He Crawled Through the Window and into My Bed."[47]

During the revocation hearing, the publishers asked the hearing officers to consider the publication's willingness "to cooperate with the Post Office Department" and "to see if something could not be

worked out short of a denial of second-class privileges. . . ." While the hearing officers were not authorized to consider questions of future practice they nonetheless raised some questions. The publisher was asked if, in the future, the magazine would carry "pictures of women's limbs and breasts exposed, and so on" and whether future issues would contain "stories with emphasis on the sex angle, by sex angle meaning stories in which morals are involved, sex life, love life, and the like."[48]

The board of directors of Dell, publishers of Front Page Detective, passed a resolution in response to these questions. The board promised that women's limbs and breasts would not be "unduly" exposed and that stories would not "over-emphasize attention to immoral sex life or so-called love life." These modifications--"unduly," "over-emphasize"--were taken by the Post Office to indicate "equivocation" on the part of the publisher. The request was denied.[49]

As a matter of Department policy, promises of future practice would be considered only upon reapplication and only in connection with evidence of a change in the character of a publication.

PEEK had changed in character in the year preceding the revocation of its permit. An ACLU staff member described the publication in 1942:

> PEEK has been for well over a year a clean magazine whose 'sexy' pictures are confined to leg-art and pictures of pretty girls wearing tight sweaters. The jokes have not been very amusing but they have not been obscene either. Prior to this change of policy, some material had appeared which might have been called obscene, but for over a year such stuff has not appeared.[50]

But while PEEK was changing its policy, the Post Office was changing, too. Leg art and girls in tight sweaters were obscene after April 1942 and their presence could cost a magazine the second-class permit. The August and September issues of PEEK were said to be nonmailable because of stories and pictures such as "Loose Talk," "Big Oomph and Little Oomph" and "Dude Ranch." The second-class permit was revoked in August, before the September issue could be mailed.[51]

In most revocations the Department cited material in two or three consecutive issues which made those issues nonmailable. Most of these rulings came after the magazines had passed through the mails and were for the record only.

It would be unusual if two or three consecutive issues of a previously unobjectionable periodical were suddenly found to be obscene. That this happened, not to a single magazine, but to approximately forty in little more than one year, indicates how rapidly and completely the Post Office Department changed it policy with regard to second-class revocations.* (See below)

Among the permits revoked were those of some publications seeking a change in status. The holder of a second-class permit was required to seek reentry if the periodical changed name, frequency of publication or place of issue. Detective Fiction wanted to change its title to Flynn's Detective. Reentry under the new name was denied and the publication was also found to be nonmailable. Its permit was revoked.

Stocking Parade, a bi-monthly, requested reentry as a monthly. The request was denied and the second-class permit revoked. And Famous Fantastic Mysteries, a monthly published in New York, sought reentry as a quarterly and a change in place of issue to Chicago. Instead, upon inspection, the Post Office determined the magazine was obscene, and it lost the mailing permit altogether. In these, and similar cases, a finding that the issue on which the application was based was obscene constituted grounds for revocation.**(See below)

Revocation of existing permits--either as an original proceeding or arising from a request for reentry--was a major method of postal control in 1942 and 1943. Another method of control was the denial of second-class applications. Unlike revocation orders, the denial of a mailing permit did not require a hearing. While the publisher

---

*In addition to those publications already cited, the following are known to have lost second-class permits after April 1942:

All Story Love (6/15/42)
Headline Detective (7/15/42)
Film Fun (7/22/42)
Smiles (8/10/42)
Pictorial Movie Fun (9/10/42)
National Police Gazette (9/19/42)
Crime Detective (9/19/42)
Special Detective Cases (10/22/42)
Crime Confessions (10/23/42)
Headquarters Detective (11/12/42)
Secret Detective Cases (12/3/42)
Intimate Detective Cases (12/3/42)
Scoop Detective Cases (1/15/43)
Close-Up (3/8/43)
Judge (3/8/43)

("Obscene Publications," ACLU Files, Vol. 2436, pp. 159-65.)

**Other publications which made the mistake of calling attention to themselves during this critical period included:

Rare Detective Cases (8/1/42)
Sensational Detective Cases (8/18/42)
Tru-Life Detective Cases (9/13/42)
Hit Parade Pageant (9/29/42)
Jest (10/17/42)

("Obscene Publications," ACLU Files, Vol. 2436, pp. 159-65.)

had a right to appeal the denial, as a practical matter, the courts refused to consider such instances unless there was a clear abuse of discretion.[52] In considering applications for a permit, the third assistant postmaster general would examine copies of the magazine. The number of issues to be examined in connection with an application varied: the Post Office Department said there was "no set rule" about how many issues it needed to see in order to determine the eligibility of the publication for entry at the second-class rate.[53]

In denying an application for admission, the Post Office issued a statement similar to the revocation order, but very abbreviated. It reviewed the history and theory of the second-class privilege and concluded that the postal obscenity statutes were designed to prevent the use of the United States mails for "sustained and systematic appeals to lascivious curiosity or for the circulation of periodicals published for the purpose of profitably pandering to the obscene, lewd and indecent."

When an application for second-privileges was denied, one half the application fee was retained by the Department. Publications with a circulation of fewer than 2,000 copies paid a $25 fee; fees were $50 for circulation of 2,000-4,999 copies and $100 for over 5,000 copies.[54] Some publications applied three times in less than one year, losing half the application fee each time.

Denial of the permit did not keep all future issues of the magazine from the mails. Subsequent issues might be found nonmailable but in general, the magazine could be mailed at a higher postage rate. Having characterized a publication as making "sustained and systematic appeals to lascivious curiosity" and "profitably pandering to the obscene," the Post Office Department charged it an extra few pennies a pound for the right to use the mails.

Controls on second-class mailing privileges plainly were designed neither to protect public morals nor to keep the mails pure: they served as economic sanctions against publications which offended the tastes and sensibilities of a few top postal officials, especially the postmaster general.

At least thirty periodicals were denied second-class mailing permits after April 1942 on the grounds that one or more issues were

obscene.* (See below) Publications could reapply for a permit at any time, upon submission of the fee and presentation of copies for examination. In the meantime, publishers were asked to keep the Post Office informed of their activities:

> In the event you may wish to publish issues in the future, it will be appreciated if you will see that four copies are sent to this office, of any issue that you may deposit in the mails.[55]

Despite the awkward construction, the message carried an ominous note: "In the event you may wish to publish issues in the future. . . ." Without the low mailing rate, for some there could be no issues in the future.

Publications which had once held second-class permits but had lost them through revocation could apply for readmission to the low rate. Many publishers apparently made a real effort to meet the objections of the Post Office Department and be admitted. Creston Publications, Inc., published Rare Detective Cases and Spotlight Detective Cases. Permits for both were revoked in 1942. The publisher protested to the Post Office Department:

> They are clean from cover to cover. We even refused $500.00 worth of advertising, some of which is being carried by lots of magazines that have second class entry.
> It has been a fight for us to survive without this privilege.

---

*Applications for the following are known to have been denied:

Spark (5/27/42)
Keen (5/27/42)
Broadway Parody Songs (6/9, 6/29, 8/5/42)
Exclusive Detective (6/15/42)
Gripping Detective Cases (7/8/42)
Play (7/17/42; also 10/31/41,4/11/42)
Squads Riot (7/21/42)
Feature Detective Cases (7/31/42)
Spotlight Detective Cases (7/31, 12/2/42)
Snap (8/17/42)
Real Screen Fun (8/24/42)
Uncensored Detective (8/25/42)
Sir (9/10,11/11,12/23/42)
Jest (9/23/42)
Song Parodies (9/28/42)
Real Story (9/29/42)
Stocking Parade (10/10, 12/23/42)
She (10/17/42)
Graphic Picture-News Magazine (12/24/42)
Nifty (1/8/43)
Speed Detective (1/15/43)
All-Story Love (1/15/43)
Gay Love Stories (1/25/43)
Rare Detective Cases (1/30/43)
Real Romance (2/1/43)
Dan Turner Hollywood Detective (2/2/43)
Street and Smith's Love Story Magazine (3/20/43)
View (1/11/44)

("Obscene Publications," ACLU Files, Vol. 2436, pp. 159-65.)

> We certainly have been damaged--in fact, almost put out of business by being deprived of our second-class privilege. These magazines we are putting out would stand appraisal or examination by the most--shall we say--particular.
>
> May I ask why we were deprived of it on Rare Detective Cases without even a hearing? Your regulations as they were read to me seemed to provide that we should have a hearing. I have made no complaint on this score before; in fact, I have nothing in the nature of a complaint at all. But after reading how the publishers of True Confessions were treated, it does seem as though we should have been treated at least as well on our Detective magazines. I should like to hear from you on this score.[56]

True Confessions had surrendered its second-class permit and then applied for reentry. While its application was pending, True Confessions was given a conditional permit. Under the terms of a conditional permit, the publication was carried as second-class mail but the publisher deposited with the Post Office the equivalent of third- or fourth-class postage. If the application for reentry as second-class mail was subsequently granted, the deposit was returned to the mailer; if it was denied, the deposit was retained by the Department.

Following the publisher's protest, conditional permits were granted the two Detective magazines in October 1942. However, Spotlight was discontinued in December 1942 and Rare Detective Cases was denied reentry in January 1943.[57] Conditional permits lapsed when reentry was denied.

Most magazines were not given conditional permits. They simply paid the higher third- or fourth-class rates while their applications were being considered. And a few periodicals were readmitted. Smiles, under its former title, Amazing Man Comic, had lost the second-class privilege earlier. Reentry was denied in August 1942 but granted in October 1943.[58] In September 1943 the permit of the National Police Gazette was restored after almost a year.[59] Street and Smith's Love Story magazine and Romance were also readmitted.[60] But other applications for readmission were denied, often with no reason given.* (See below)

---

*Reentry is known to have been denied to the following:
Complete Detective Cases (2/9/43)
Young's Realistic Stories (2/9/43)
Argosy (2/22/43)
New Love Magazine (2/24/43)
Speed Mystery (3/6/43)
("Obscene Publications," ACLU Files, Vol. 2436, pp. 159-65.)

The revocations and denials involving these seventy or so publications were based on their alleged obscenity. A magazine which was obscene was nonmailable; one which was nonmailable was not eligible for the second-class permit. In revocations and denials the Post Office also referred to the requirement that second-class mail matter be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry"--the fourth condition of the Classification Act of 1879. However, emphasis in these actions was on sins of commission, obscenity, rather than of omission, failure to contribute to the public good.

In the Esquire case the fourth condition became the focus. The power of the postmaster general to revoke second-class mailing privileges simply because a periodical failed to make "a special contribution to the public welfare" was tested, and found lacking.

Esquire, "The Man's Magazine," was less serious and less respectable in 1943 than it is in 1975. It was not, however, in the same category as Nifty, Snap and Scoop Detective Cases. Esquire included work by Paul Gallico, Irwin Shaw, Ring Lardner and Gilbert Seldes, among others. It offered both fiction and nonfiction, ranging from sports stories to literary criticism. However, it also carried a lot of third-rate material, thin adventure stories with swashbuckling illustrations, jokes and cartoons based on juvenile double-entendres and blood-and-guts war stories. And it had the Varga Girls.

The Varga Girls were the creation of Alberto Varga, a Peruvian-born illustrator. They were rather pale but amazingly healthy blondes, pictured in a variety of costumes and activities. Each month Esquire featured a Girl and a verse by Phil Stack, usually in something approaching the form of an English sonnet. The Girl and the verse together illustrated a motif such as "Torches at Midnight," "Virtue Triumphs" or "Vacation Reverie." The Girls were immediately and immensely popular with readers. They were introduced in the magazine in December 1940 and one month later a reprint offer sold 327,000 copies. The reprints, which consisted of twelve drawings illustrating scenes appropriate to each month, sold 2.5 million copies in 1944.[61]

The Varga Girls were cited in the show cause order issued by the Post Office to Esquire in September 1943. A hearing was set on the revocation of the magazine's second-class permit. The Department initially cited thirty-six pages of material as being lewd, obscene or lascivious; fifty-two pages of "similar and related matter" were cited later. These 86 pages were among the 1972 published in Esquire from January to November 1943.[62]

The material complained of included twenty-two Varga Girl drawings (twelve in the January issue and one in each of the following ten months), twenty-four cartoons, nineteen articles or stories, thirteen pictures, six letters to the editor, twelve installments of "Goldbricking with Esquire" (material reprinted from Army camp magazines), one cover, one poem and two advertisements.[63] All these things were said to be obscene.

The Esquire hearing lasted three weeks, produced 1865 pages of testimony and featured platoons of witnesses. Chairman of the hearing board was Walter Myers, the fourth assistant postmaster general. Tom C. Cargill, a deputy assistant postmaster general, and Frank Ellis, chief clerk and director of personnel, were the other members.

The case for the Department was based on the testimony of nine witnesses and the presentation of some exhibits. The exhibits apparently consisted entirely of clippings from the magazine pasted into unwieldy scrapbooks, dummies of earlier issues altered to meet Post Office objections, receipts for mailing and two letters from the New England Watch and Ward Society.[64]

The Department's witnesses demonstrated a remarkable unfamiliarity with the publication against which they were testifying. For example, Peter Marshall, a clergyman and author, admitted he had spent about one hour examining the eleven cited issues. Marshall was also unaware that the magazine's contributors included such persons as Father Flanagan, and George Jean Nathan, who wrote monthly theater reviews.[65] The witnesses called by the Department were not presented as experts in the mores of the day but only voiced their personal opinions about the magazine. However, even this rather conservative band found about two-thirds of the cited material to be not obscene.[66]

Esquire presented thirty-eight witnesses. Some appeared in person but most provided statements to be read into the transcript. The witnesses included pyschologists, specialists in art and advertising, authors, educators, psychiatrists and public opinion pollsters. All agreed that none of the matter was obscene, although some was said to be indelicate, vulgar and in bad taste.

Polls conducted by Crossley, Inc. and by Curtis Publishing Co. were introduced by Esquire. These polls found that 77 to 80 per cent of the adults interviewed did not find the Varga Girls obscene, and approximately the same number would permit them, presumably the pictures, in their homes.[67]

The Post Office Department objected to the parade of witnesses summoned by Esquire. The testimony of a psychiatrist who discussed the effect of the magazine on the "average mind" was said to be unnecessary. Since the average mind included the members of the hearing board, the assistant solicitor reasoned, the testimony of the psychiatrist was of no value. The Department also protested that there was no precedent for the kind of testimony being offered by the Esquire witnesses and that the inclusion of such material was "unfair to the Department." Attorneys for the magazine responded that they had told the Department, in their brief filed two weeks earlier, that they intended to call witnesses to establish that most adult Americans did not find Esquire obscene.[68]

The calling of expert witnesses was clearly in line with recommendations of the Attorney General's Committee on Administrative Procedure:

> Humility and a recognition that a proper determination of what is obscene requires a knowledge so wide and a sympathy so broad that one man is unlikely to be able, without outside assistance, to undertake the task. . . .At present, the Post Office Department's determination is made without any canvass of outsiders' opinions. It may be possible for it to appoint panels of experts--scholars in the field of art, the sciences, literature, and sociology--to whom it may turn for opinions and recommendations.[69]

While the Esquire witnesses did not form a panel, they did bring outside and somewhat expert opinions to the hearing.

Attorneys for Esquire also showed that there had been no other objections to the cited material. The January to November issues had passed freely through the mails for eleven months, yet now they were said to be obscene. None of the cited issues was known to be disapproved

by any major censorship group and the magazine was not on the lists of the NODL or the Watch and Ward Society. Moreover, during the months the Post Office had examined dummies prior to publication, some of the cited material, such as the Varga Girls, had been published without objections.[70]

The magazine also showed that it was acceptable to another department of government, if not to the Post Office. By arrangement with the War Department, a special edition with a circulation of several hundred thousands was sent to troops overseas. And the domestic newsstand distribution of Esquire was by Curtis Publishing, parent of such respectable periodicals as the Saturday Evening Post and Ladies Home Journal.

After three weeks of testimony and the presentation of oral arguments, the board deliberated and on November 11, 1943 announced its findings. Two members recommended that the proceedings be dismissed and the second-class entry be "continued in full force and effect."[71] The third recommended that the August issue be found nonmailable and that, because of this ruling, the permit be revoked.[72]

Chairman Walter Myers and Frank Ellis concurred in a finding that "the charge of obscenity in the original and amended citation has not been supported and proved in fact or in law."[73] They reviewed each item cited by the postmaster general and found nothing plainly obscene in Esquire, although they noted that stories and pictures were often "silly," "vulgar," "indelicate and probably in bad taste."

The majority found two items particularly offensive, but not sufficient grounds for revocation. One was an article in the June issue called "Libel Suits Were As Wine to that Hell-Firin' Editor." The other was a picture in the August issue captioned "Paste Your Face Here." About the latter, the majority report said, "It is believed that to the average reader the intent derived therefrom would be a nasty take-off on an act of sex perversion."[74]

Myers and Ellis were obviously impressed with the quality of the Esquire witnesses. But the dissenting hearing officer, Tom C. Cargill, was not. He objected to the fact that witnesses were paid $500 for each day of testimony.[75] This handsome fee indicated to Cargill that the witnesses were "bought and paid for" and "not without prejudice."

Cargill did not find the Varga Girls themselves obscene but objected to them, because, "like the general tone of the magazine, they keep sex before the reader." And that, according to Cargill, was the sin of Esquire. The dominant theme of the magazine was said to be double meanings bearing on sex. That the magazine had earlier made changes to conform to Post Office standards was evidence of its character. Cargill reasoned that no "reputable magazine whose policy was one that stood for decency" would submit to prior censorship; Esquire had submitted to prior censorship; therefore, Esquire was not a reputable magazine.[76] And therefore, it should not retain the second-class permit.

The findings and recommendations of the hearing board in second-class revocations were only advisory. The postmaster general later explained that the hearing officers formed a board, not a court. Each submitted a report, "if two concur, their report will be numerically, a majority report, in the sense that they outnumber the non-concurring hearing officer. But their report, is not, in any sense, the report of the three hearing officers, nor the minority member's report a dissent."[77]

Whatever else the majority report was, it was ignored by Walker. On December 30, 1943, the postmaster general ordered the second-class permit of Esquire revoked effective February 28, 1944.

In announcing the revocation, the postmaster general used many of the same arguments and explanations in the revocation order cited earlier. The history and purpose of the rate were considered, the conditions for holding a permit were discussed and the ineligibility of Esquire was catalogued. According to the order, Esquire in a general and systematic manner included material which was nonmailable, and therefore the magazine did not meet the requirements for the permit.[78]

However, the Esquire revocation order stressed the fourth condition of the Classification Act of 1879, the requirement that publications be devoted to dissemination of information of a public character. The postmaster general suggested that there were two competing theories of the second-class rate: 1) "that the Federal government, as a matter of national policy, intends to foster, subsidize, grant affirmative assistance and otherwise approve every kind of periodical irrespective of its contribution to the public welfare and the public good";[79]

2) that the rate applies only to publications devoted to classical literature, fine arts, useful arts or news, thus excluding fiction, humor and other light reading.

The postmaster general obviously preferred the latter interpretation. However, he confounded the issues by introducing moral qualities as well as subject matter. The theories described seem to be based on the content of the publications. On the one hand, there are serious periodicals devoted to literature, the arts or news. On the other, there is "every kind of periodical publication." However, the key to this classification is not in content, but in treatment. Walker wrote:

> The language of the Act of Congress establishing the Fourth Condition seems plain and specific. I am unable to distort the plain meaning of plain words.
>
> The plain meaning of this statute does not assume that a publication must be in fact "obscene" within the intendment of the postal obscenity statutes before it can be found not to be "originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts or some special industry."
>
> Writings and pictures may be indecent, vulgar and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public good and the public welfare.[80]

But the mere absence of questionable material was not enough to insure a second-class permit, according to Walker:

> A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.[81]

It was not made clear how a publication could meet this affirmative responsibility. But if these criteria were applied to all applicants for the second-class permit, it seems that only a handful would be granted. Periodicals devoted to sports, light fiction and personality features would not seem to meet the standard of contributing to the public good.

The postmaster general appeared to welcome a court test of his interpretation of the fourth condition. Walker admitted that the statute involved, the Classification Act of 1879, was somewhat ambiguous and said that it was for the courts to clarify its meaning. However, if

judicial interpretation ran counter to his own, he hoped Congress would enact legislation consistent with his view:

> I do not believe that a statute which so vitally, directly and continually affects so many should long remain in the realm of doubt c subject to the vagueness of the whatever Postmaster General may then be administering them. [sic]
>
> It is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges. If our courts conclude that the Fourth Condition is a series of words without meaning, and that under it the Postmaster General actually cannot and should not revoke or deny second-class mailing privileges to publications such as this, then it is for the Congress to unequivocally and clearly state what if any are the standards to which a publication must conform before Congress will permit it to be given the cheapest rate of postage and contribute government funds to pay its cost of distribution by mail.[82]

The dollar value to Esquire of the second-class permit did not escape Walker, who protested, " I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately $500,000 per annum."[83] During the first seven months of 1943, Esquire paid $66,341.52 in second-class postage; the cost of mailing 2.9 million pounds of the magazine at fourth-class rates would have been $369,045.43. For a full year, the difference would have been about $500,000.[84]

David Smart, publisher of Esquire, was surprised that Walker had overruled the recommendations of the hearing board and was "speechless" at the decision to revoke.[85] He found enough words to immediately announce that he would appeal the revocation in the federal courts.

In January 1944 Esquire brought suit in the U.S. District Court in the District of Columbia. The magazine sought to restrain Walker from enforcing the revocation order.

One of the most significant developments in the case took place before it reached the courts. In pretrial proceedings, it was agreed by both parties that obscenity was not at issue. The Post Office said that, in regard to Esquire, the question of obscenity was "irrelevant" and that the revocation rested on Esquire's failure to meet the fourth condition.[86]

The case reached the District Court in June 1944. The question before the court was whether the action of the postmaster general in

revoking the second-class mailing privileges of Esquire was authorized by law.

The case for the magazine centered on a few points. It was argued that the postmaster general's construction of the fourth condition created serious doubts as the the constitutionality of the second-class mail statutes. Since a statute must be construed, if possible, in a way which makes it constitutional, Esquire said that the Department's reading of the Classification Act must be rejected. Moreover, the magazine argued that the long-established construction of the statute should not be overturned unless it was clearly wrong. For sixty-five years the Post Office had routinely granted second-class permits to publications without any evidence of their contribution to the public good. The new interpretation, according to Esquire, ran counter to tradition and practice.[87]

Esquire charged that the revocation order violated the First Amendment and discriminated against Esquire. The magazine alleged that a permanent revocation of the mailing permit amounted to prior restraint and that the Post Office Department was usurping the power of Congress to classify mail. Esquire charged that the postmaster general had assumed, "without statutory authority and in direct violation of the Bill of Rights, to act as a universal censor of the press and of public morals."[88]

The magazine also made a feeble attempt to assert that it was "devoted in part to the special industry of clothing."[89] This was a transparent effort to meet the requirements of the fourth condition. It was not successful: editorial analysis by Lloyd Hall Co. showed that slightly less than 7 per cent of the editorial content of the magazine was devoted to the industry of men's clothing.[90]

The case for the postmaster general rested principally on the doctrine that the decision of the head of an executive department should not be disturbed unless it is clearly wrong. While admitting that there might be court review of his decisions, the postmaster general claimed that in the case at hand the only question was whether the action was "so vitiated by fraud or mistake that equity will not permit his order to stand." The postmaster general conceded that a mailer who unquestionably met all statutory requirements for the second-class permit had a

right to one. But Walker claimed that the only basis for court relief was that the permit had been denied "fraudulently or upon some ground which has no basis in the [Classification Act of 1879]."[91] Since the Esquire revocation was based on a section of the act, Walker argued, it was not ordinarily subject to review.

The revocation of second-class permits, the postmaster general continued, was an administrative matter, one which called upon the "special administrative competency acquired by himself and by the permanent staff of the Post Office Department, based upon the wide experience and technical background which is the accumulation of an extended administrative history."[92] This was a perfectly specious argument for Walker to offer. In fact, the "extended administrative history" of the Department--from 1879 to 1942--showed routine issuance of permits and attention more to technical requirements than to contents of publications. Moreover, Walker's "wide experience and technical background" was in party politics--he had been treasurer and later chairman of the Democratic National Committee--not postal administration. And he had rejected the recommendations made by members of the "permanent staff."

The Esquire case was heard by Judge T. Whitfield Davidson, who usually sat on a U.S. District Court in Texas but was temporarily assigned to the District of Columbia bench. Judge Davidson upheld the revocation order and almost seemed to invite the Post Office to make active use of the fourth condition in similar proceedings. His reading of the condition was even more narrow than that offered by Walker. Judge Davidson noted that the men who wrote the Classification Act were Victorians; it would be reasonable to assume that they hoped to foster by low mailing rates "literature of desirable type of an educational value [sic]."[93] The judge suggested that McGuffey's Readers--the mid-nineteenth century school texts heavy with morally uplifting sentiments--were the sort of thing Congress had in mind in passing the law. This conclusion is not supported by debates in Congress at the time the act was passed; the debates centered on technical problems and the question of censorship--and how to avoid it.[94]

In upholding the revocation, Judge Davidson found that the power claimed by the postmaster general was not censorship nor did revocation strip the magazine of any right. Since Esquire could continue to

publish and to use the mails, denial of the low rate did not amount to censorship. Judge Davidson explained:

> There is a very decided difference between grouping and classifying and censoring. Censoring deals more with the specific article, the deleting of objectionable portions. Classifying means grouping.[95]

The decision in the District Court, however, rested chiefly on the principle that "the conclusion of a head of an executive department upon a matter of fact within his jurisdiction will not be disturbed by the Courts unless clearly wrong." This doctrine, applied in many other areas of law as well, was here traced directly to the Milwaukee Leader case. Judge Davidson said that the court might intervene only when decisions were arbitrary or capricious, not when the petitioner did not like the outcome. Since the postmaster general had indicated that many other magazines could lose their permits for the same reason Esquire's was revoked, this action could hardly be termed "capricious," according to Davidson. This was an astounding bit of legal reasoning, suggesting as it does that an arbitrary and capricious act becomes less so if applied to a large number of persons or publications. Davidson might have found that the intended future application of the rule made it nondiscriminatory, but it would be nonetheless arbitrary.

Judge Davidson's decision denying the injunction was announced July 15, 1944. Esquire immediately said it would appeal, taking the matter to the Supreme Court if necessary. Editorial interest in second-class revocation, interest apparent only after the Esquire order, was fanned by the District Court decision. The New York Times said that the action amounted to censorship and was appalled at the suggestion that McGuffey's Readers should set the standards for second-class mail. The Times made an observation equally appropriate to most instances of postal control:

> Like other magazines Esquire is a publication which some people are interested in and buy and others are not interested in and do not buy. Like a number of other magazines it is frank in its treatment of the feminine form--as frank as any bathing beach--and in pictures and text it frequently treats sex as a fascinating joke. One can't see that it could do harm to any reader who wasn't eager to have harm done to him.[96]

Esquire appealed to the United States Circuit Court of Appeals for the District of Columbia. The case was argued in April 1945 and

the decision was announced on June 4. The appeals court reversed the the court order denying the injunction. The opinion, written by Judge Thurman W. Arnold, systematically rejected every contention raised by the Post Office Department.

Judge Arnold first denied that the Post Office could accept periodicals for mailing but deny them the second-class rate on the grounds that they failed to contribute to the public good. To do so would be to place at a competitive disadvantage those publications which did not conform to the vague and perhaps personal standards of an administrative official.

The Department's case rested in large measure on the theory that postal service, and especially the second-class rate, is a privilege. The court specifically rejected this point:

> What the government appears to assert is that the power to charge Esquire an additional $500,000 a year for the use of the mails, unless it conforms to the Postmaster General's notions of the public good, is not a power to censor because the magazine may be mailed at a higher rate. The key to this extraordinary contention is found in the Postmaster General's reference to second-class mailing rates as 'unique privileges.' He appears to think of his duty under the statute, not as administration of nondiscriminatory rates for a public service, but as analagous to the award of the Navy E for industrial contributions to the war. The Navy E is an award for exceptional merit. The second-class mailing rate is conceived by the Post Office to be an award for resisting the temptation to publish material which offends persons of refinement.
>
> But mail service is not a special privilege. It is a highway over which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good, the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise. The case before us involves freedom of speech as well.[97]

The idea of mail service as "a highway over which all business must travel" ran counter to a critical doctrine of postal control, that is, that there are other means by which matter banned from the mails might be transported. This idea had been cherished by the courts and exploited by the Post Office since it had been announced in 1877.[98] However, lower courts had begun to recognize the fiction of this position. Judge Arnold quoted with approval from a 1941 Court of Appeals decision:

> Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in greater degree than upon any other activity of the government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means.[99]

Rejection of the privilege theory, the court found, was enough to decide the case. But the opinion did not stop there. The case against Esquire was explicated in the hope that "the voluminous record may serve as a useful reminder of the kind of mental confusion which always accompanies such censorship." In this spirit, excerpts from the revocation hearing were quoted, showing the utter futility of trying to draw lines between art and immorality, humor and low comedy.

The problem of expert witnesses was also addressed by the court. It was noted that Esquire assembled persons of national distinction while the Department was "supported only by five clergymen, a psychiatrist, a lady prominent in women's organizations, and an assistant superintendent of schools." Both sides might have obtained thousands of reputable experts, but the court noted: "We know of no way a court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read." In relying on such testimony, there is the danger that the postmaster general might "impose the standards of any reputable minority group on the whole nation."

The record of the hearing was cited, not to criticize counsel for the Post Office, but "as a memorial to commemorate the utter confusion and lack of intelligible standards" inevitable in such undertakings. The court concluded: "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom or night stays these couriers from the swift completion of their appointed rounds.'"[100]

Postal officials were not relieved to be limited to such mundane duties as carrying the mail. In October 1945 the government filed an appeal in the Esquire case, saying that the decision had left the Department "at sea" and cast "doubts upon the constitutionality of possible legislation in the future to limit second-class mailing privileges."[101]

Robert E. Hannegan had replaced Frank Walker as postmaster general on July 1, 1945, and Hannegan became the petitioner in the new appeal.

The case went to the Supreme Court in the fall and was decided on February 6, 1946. Justice William O. Douglas wrote the opinion for the unanimous eight-man court affirming the the Court of Appeals decision.[102] Justice Douglas first considered the magazine itself. He noted that only a small percentage of the contents had been objected to by the Post Office, and yet this small number of items was said to give the magazine a dominantly immoral tone. On this basis, the magazine was said to not meet the requirements of the fourth condition. The Court did not agree:

> An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts." It is whether the contents are "good" or "bad." To uphold the revocation order would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.[103]

The Court found that the intention to censor could not be inferred from the legislative history of the second-class permit. All classes of mail are based on "objective standards which refer in part to their contents, but not the quality of their contents." This, the Court explained, meant that the fourth condition "must be taken to supply standards which relate to the format of the publication and the nature of its contents, but not to their quality, worth or value. In that view, 'literature' or the 'arts' mean no more than reproductions which convey ideas by words, pictures or drawings."[104]

This did not mean, according to Douglas, that Congress must open the second-class rate to all types of publications. But restrictions must not be based on a requirement that the applicant convince the postmaster general that his publication contributes to the public good. To do so would be to invite decisions based not only on literary tastes but perhaps on economic or social views as well. This, as Justice Felix Frankfurter said in his concurring opinion, touched on "the very basis of a free society, that of the right of expression beyond the conventions of the day. . . ."[105]

The significance of the decision was not lost on the executives of Esquire. Alfred Smart, secretary-treasurer, noted that the decision

"was not in any way a reflection of opinion about the magazine but rather a reflection on the real issues of censorship which lay behind."[106] It was almost three years since the original show-cause order, during which time the magazine had incurred perhaps one-half million dollars in legal expenses.[107]

But the issues did indeed go well beyond the specific case. In the long and costly legal battle, Esquire had won for all other magazines a clarification of the powers of the postmaster general under the second-class mailing statutes. The power described by the Court was significantly less than that claimed by the Post Office Department.

The Esquire decision marked the end of a short-lived experiment in postal control. It began in April 1942 with the assault on a few borderline girlie magazines and gathered steam. The Post Office became bolder. Initial revocations and denials were based on allegations of obscenity; in Esquire the charge was simply failure to contribute to the public good.

Justice Douglas, in the Esquire opinion, noted that to uphold a revocation based on this standard would be to invite similar decisions based on the economic and social views of publications. In fact, such revocations were taking place. At least ten second-class permits were revoked in 1942 and 1943 for alleged violations of the Espionage Act. These included the pacifist newspaper, Boise Valley Herald;[108] the Socialist Workers Party Militant;[109] Labor Action, a New York City Trotskyite publication; X-Ray;[110] and Publicity.[111] And the Georgia State Agricultural Commissioner was warned that a departmental publication, Market Bulletin, might lose its second-class permit. Tom Linder was told that the permit had been issued for dissemination of matter relating to state agricultural programs and that if Market Bulletin continued to criticize federal farm policies, the permit might be revoked.[112]

It might be that the change in administration, from Walker to Hannegan, would have marked the end of revocation as a form of postal control, even without the Esquire decision. There had been almost no revocations since the initial Esquire order in December 1943; perhaps the campaign was over before the case reached the high court. However, the fact that the Post Office chose to appeal indicates that control

of second-class permits was not yet a dead issue. Had the power claimed by the Department been upheld by the Court, there might well have been a campaign against a variety of publications, admittedly not obscene, but which failed to contribute to the public good, whatever that might be.

Since Esquire, the revocation power has been seldom used. The Post Office made at least one more attempt to invoke the fourth condition, but this was not successful either. In the late 1950s the Department refused to grant its old adversary Sunshine and Health a second-class permit, as it had refused since 1933. Among other ground for the denial was the failure of the nudist magazine to contribute to the public good. Sunshine and Health appealed the denial and in an unreported decision, the District Court ordered issuance of the permit.[113]

Control over second-class privileges was a powerful and much abused weapon in the hands of the Post Office Department. The Department used it to apply economic sanctions against publications which it could not otherwise affect. The Post Office maintained a double standard, dispensing second-class permits like favors.

The magazines which lost or were denied second-class permits in 1942 and 1943 represented only a small fraction of the periodicals holding permits--perhaps 70 out of some 26,000.[114] And most of them were not very good magazines either in terms of content or style. But that, of course, is beside the point.

FOOTNOTES

[1]United States Statutes at Large, I, 232, 238 (1792). Subsequent reference will adopt standard legal citation form; thus, 1 Stat. 232, 238 (1792).

[2]17 Stat. 300 (1872).

[3]18 Stat. 232 (1874).

[4]S. 539, 45th Cong., 2d sess. (1878).

[5]20 Stat. 359 (1879).

[6]Houghton v. Payne, 194 U.S. 88, 94 (1904). See also Bates & Guild Co. v. Payne, 194 U.S. 106 (1904).

[7]Lewis Publishing Co. v. MOrgan, 229 U.S. 288 (1913).

[8]37 Stat. 553 (1912).

[9]40 Stat. 217 (1917).

[10]40 Stat. 217, 230 (1917).

[11]United States Code, XXXIX, chapter 30. Subsequent references: 39 U.S.C. ch. 30.

[12]U.S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 427 (1921).

[13]Ibid., 437.

[14]U.S., Post Office Department Annual Report of the Postmaster General (Washington, D.C.: Government Printing Office) for the years 1920-1940; U.S., Congress, Senate, Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. 186, 76th Cong., 3rd sess., 1940., Pt. 12: The Post Office Department, 7.

[15]Administrative Procedure in Government Agencies, p. 13.

[16]Ibid., pp. 6-7.

[17]Ibid., p. 9.

[18]Ibid., p. 14.

[19]For example, New Republic, Oct. 19, 1942, p. 481; Life, Oct. 26, 1942, p. 109; Christian Century, Jan. 12, 1944, p. 37.

[20]Catholic Action, February, 1944.

[21]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), p. 7 in the National Archives, Records of the Post Office Department, Record Group 28, Series 168, Case File Relating to Esquire Magazine 1943-46. (Subsequent references to this collection of documents will be cited only as Esquire Case File.)

[22]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), p. 7, in Esquire Case File.

[23]Letter, Ramsey S. Black, third assistant postmaster general, to the postmaster at Chicago, Oct. 26, 1940, in Esquire Case File.

[24]Personal letter, Arnold Gingrich, June 19, 1974.

[25]Arnold Gingrich, Nothing But People (New York: Crown Publishers, 1971), p. 158.

[26]Personal letter, Arnold Gingrich, June 19, 1974.

[27]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), pp. 9-11, in Esquire Case File.

[28]Ibid.

[29]Letter, Vincent Miles, solicitor for the Post Office Department, to Esquire, Inc., Nov. 1, 1940, in Esquire Case File.

[30]Ibid.

[31]ACLU office memorandum, Aug. 14, 1942 in Princeton University, Firestone Library, Files of the American Civil Liberties Union, Vol. 2349, p. 70. (Subsequent references to this collection are cited ACLU Files.)

[32]Zechariah Chafee, Jr., Government and Mass Communications (Chicago: University of Chicago Press, 1947), I, 350.

[33]Letter, Elmer Rice, ACLU, to Kenneth McKellar, U.S. Senate, [June, 1942], ACLU Files, Vol. 2349, pp. 229-30.

[34]Letter, Vincent Miles to Arnold Gingrich, May 21, 1942, in Esquire Case File.

[35]17 Stat. 598 (1873).

[36]POD Order No. 17493, April 21, 1942, ACLU Files, Vol. 2349, p. 65.

[37]Letter, Donald Staley, District of Columbia ACLU, to Roger Baldwin, ACLU, Feb. 2, 1943, ACLU Files, Vol. 2436, p. 147.

[38]POD Order No. 18238, July 15, 1942, ACLU Files, Vol. 2435, p. 173ff.

[39]Whether dealers looked on the second-class permit as a government imprimatur is not known but some local censors found it useful. The license commissioner of New York City banned newsstand sales of magazines after their permits were revoked. (New York Times, May 10, 1943, p. 21.) And one publisher reported that fifty other communities had similar restrictions. (Letter, Andrew Albert, Creston Publishers, to N.B. Wentzel, superintendent, Division of Classification, Oct. 1, 1942, ACLU Files, Vol. 2436, p. 121.)

[40]The internal quotation is from Paschall, The Constitution of the U.S. (1868), p. 483.

[41]Quoted by the Post Office Department from the publishers' response in POD News Release, June 15, 1942, ACLU Files, Vol. 2435, p. 156.

[42]"Obscene Publications: Applications and Requests for Reentry as Second-Class Matter Denied and Second-Class Entries Revoked After Issuance of Citations Since May 1, 1942," prepared by the ACLU, March 15, 1943, ACLU Files, Vol. 2436, pp. 159-65.

[43]POD News Release, July 8, 1942, ACLU Files, Vol. 2435, pp. 168-69.

[44]Quoted by the Post Office Department from the publishers' response in POD News Release, July 22, 1942, ACLU Files, Vol. 2435, p. 54.

[45]POD News Releases July 28, 1942 (Laff), Sept. 15, 1942 (Real Detective) and Oct. 17, 1942 (Romantic Story), ACLU Files, Vol. 2435, pp. 196, 208,215.

[46]POD News Release, July 3, 1942, ACLU Files, Vol. 2435, p. 164.

[47]POD News Release, June 4, 1942, ACLU Files, Vol. 2435, p. 149.

[48]POD Order No. 18293, July 15, 1942, ACLU Files, Vol. 2435, p. 189.

[49]Ibid.

[50]ACLU office memorandum, Aug. 14, 1942, ACLU Files, Vol. 2349, p. 70.

[51]POD News Release, Aug. 4, 1942, ACLU Files, Vol. 2435, p. 198.

[52]Letter, J. Autin Latimer to Creston Publishing, Oct. 30, 1942, ACLU Files, Vol. 2436, p. 137.

[53]Letter, Ramsey S. Black to Andrew Albert, Sept. 4, 1942, ACLU Files, Vol. 2436, p. 117.

[54]Administrative Procedures in Government Agencies, p. 5.

[55]Letter, Albert Goldman, postmaster at New York City, to Spotlight Detective Cases, Aug. 3, 1942, ACLU Files, Vol. 2436, p. 111.

[56]Letter, Andrew Albert to Ramsey S. Black, Sept. 30, 1942, ACLU Files, Vol. 2436, p. 118.

[57]ACLU office memorandum, n.d., ACLU Files, Vol. 2436, p. 159.

[58]POD News Release, Aug. 16, 1942, ACLU Files, Vol. 2435, p. 204; cited in subpoena to Postmaster General Frank C. Walker, July 6, 1944, in Esquire Case File.

[59]New York Times, Sept. 1, 1943, p. 24.

[60]Subpoena to Walker, July 6, 1944, in Esquire Case File.

[61]Brief for the Postmaster General, before the Court of Appeals, Esquire v. Walker (D.C., 1945), p. 43, in Esquire Case File.

[62]"Transcript of Proceedings before the Post Office Department: In the Matter of Esquire Magazine, October-November, 1943," pp. 31-32, in Esquire Case File. The amended complaint was filed Oct. 4, 1943.

[63]Estimate based on Post Office Department Exhibits, in Esquire Case File.

[64]Ibid.

[65]"Transcript of Proceedings," pp. 1580-89.

[66]"Majority Report, In the Matter of Esquire Magazine," in Esquire Case File.

[67]The Department later used these same figures to show that 20-23 per cent of those interviewed found the pictures obscene. (POD Order No. 23459, Dec. 30, 1943, ACLU Files, Vol. 2548, p. 10.)

[68]"Transcript of Proceedings," p. 52-53, 1590-91.

[69]Administrative Procedures in Government Agencies, pp. 14-15.

[70]"Transcript of Proceedings," pp. 42, 1810.

[71]"Majority Report."

[72]"Minority Report, In the Matter of Esquire Magazine," in Esquire Case File.

[73]"Majority Report."

[74]Ibid.

[75]Those who presented statements apparently were not paid; those who testified in person were compensated for their time. At least one important witness refused any fee. H.L. Mencken went from his home in Baltimore to the hearing in Washington and "refused to accept even his carfare by way of reimbursement for his time and travel, saying that he had enjoyed himself so much that he would cheerfully have paid to get in." (Gingrich, People, p. 162.)

[76]"Minority Report."

[77]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), in Esquire Case File.

[78]POD Order No. 23459, Dec. 30, 1943, ACLU Files, Vol. 2548.

[79]Ibid.

[80]Ibid.

[81]Ibid.

[82]Ibid.

[83]Ibid.

[84]Costs of postage are from the testimony of Nelson B. Wentzel, superintendent, Division of Mail Classification, "Transcript of Proceedings," p. 48.
In 1943 the circulation of Esquire ranged from 615,000 in April to 850,000 in January. Not all copies were distributed by mail. Albert Krueger, Esquire circulation manager estimated that 274,000 copies of one issue were mailed to subscribers and news dealers, 306,000 copies of the same issue were delivered to news agents by freight and express, and another 58,000 were delivered locally. (Letter, Ernest Kreutgen, postmaster at Chicago, to Ramsey S. Black, Oct. 30, 1943, in Esquire Case File.)

[85]New York Times, Dec. 31, 1943, p. 13.

[86]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), pp. 32-33, in Esquire Case File.

[87]Plaintiff's Brief, before the District Court, Esquire v. Walker (D.C., 1944), in Esquire Case File.

[88]Revised Complaint, Esquire v. Walker (D.C., 1944), in Esquire Case File.

[89]Ibid.

[90]Post Office Department memorandum, Feb. 3, 1944, in Esquire Case File.

[91]Defendant's Brief, before the District Court, Esquire v. Walker (D.C., 1944), p. 48b.

[92]Ibid.

[93]Esquire v. Walker, 55 F. Supp. 1015, 1019 (D.C., 1944).

[94]Congressional Record, 45th Cong., 3rd sess., Vol. VIII (1879), 689-90, 696-98, 2135.

[95]Esquire v. Walker, 55 F. Supp. 1015, 1021 (D.C., 1944).

[96]Editorial, New York Times, July 20, 1944, p. 18.

[97]Esquire v. Walker, 151 F.2d 49, 51-52 (D.C., 1945).

[98]Ex parte Jackson, 96 U.S. 727 (1877).

[99]Pike v. Walker, 121 F.2d 37, 39 (D.C., 1941).

[100]Esquire v. Walker, 151 F.2d 49, 55 (D.C., 1945)

[101]Quoted in New York Times, Oct. 11, 1945, p. 21.

[102]Hannegan v. Esquire, 327 U.S. 146 (1946). Associate Justice Robert H. Jackson was the chief American prosecutor at the Nuremberg trials and did not participate in the Esquire decision.

[103]Ibid., 151.

[104]Ibid., 153.

[105]Ibid., 160.

[106]Telegram, Alfred Smart to Roger Baldwin, Feb. 6, 1946, ACLU Files, Vol. 2716, p. 37.

[107]From the show cause order to the decision in the District Court Esquire's legal fees were $250,000--and there were still two appeals to fight. (Tide, Aug. 1, 1944, p. 19.)

[108]ACLU Reports, June, 1943, p. 35.

[109]The permit of the Militant was revoked in March 1943 and restored in March 1944. (Letter, Ramsey D. Black to postmaster at New York, March 7, 1944, ACLU Files, Vol. 2549, p. 73.)

[110]Labor Action and X-Ray lost permits in December 1942. (ACLU office memorandum, ACLU Files, Vol. 2349, n.p.)

[111]POD Order, May 9, 1942, ACLU Files, Vol. 2435, pp. 135-38.

[112]ACLU office memorandum, August 1942, ACLU Files, Vol. 2349, pp. 200-203.

[113]James C.N. Paul and Murray L. Schwartz, Federal Censorship (New York: Free Press of Glencoe, Inc, 1961), p. 308.

[114] In 1942 there were 25,837 second-class permits. In that year 2,238 new permits were granted, and 89 applications were denied. Permits for 2,590 periodicals were discontinued--either revoked or abandoned. (Annual Report of the Postmaster General for 1942, pp. 22-23.)